IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC

THURSDAY, THE 13TH DECEMBER 2007 / 22ND AGRAHAYANA 1929

WP(C).No. 30096 of 2007(G)

PETITIONER:

D.KOMALAN,
KOMALA BHAVAN, EZHUKONE P.O.,
KOLLAM.

BY ADV. SRI.ELVIN PETER P.J.

RESPONDENTS:
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1. STATE OF KERALA, REPRESENTED BY THE SECRETARY TO GOVERNMENT, FISHERIES AND PORT DEPARTMENT, GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.

2. THE SUPERINTENDING ENGINEER, PORTS ENGINEERING DEPARTMENT, SOUTHERN RANGE, ASRAMAM, KOLLAM-2.

3. THE EXECUTIVE ENGINEER, THANKASSERY FISHING HARBOUR DIVISION, ASRAMAM, KOLLAM.

BY GOVERNMENT PLEADER SRI.I.V.PRAMOD

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 13/12/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ANTONY DOMINIC, J.
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W.P.(C) NO. 30096 OF 2007 G
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Dated this the 13th day of December, 2007

J U D G M E N T

This writ petition is filed seeking to quash Exts. P15 and P16. Petitioner also seeks a declaration that he is not liable to pay the amount shown in Exts. P15 and P16. There is a further prayer to declare that there is no concluded contract between the petitioner and the respondents and therefore, the petitioner is not liable to pay the difference in the amount that is now sought to be realised from the petitioner.

2. The facts as pleaded in the writ petition show that the work of Thangassery Fishing Harbour-Black Topping the approach road connecting Auction Hall No.1 and 11 and parking area in front of the auction Hall was awarded to the petitioner. However, agreement was not executed and eventually by Ext.P5, the work order awarded to the petitioner was terminated at his risk and cost. When by Ext.P6, he was called upon to remit the loss sustained by the Government, disputing the liability, petitioner submitted his reply by Ext.P7. When the demand was again raised by Ext.P8, that was called in question in OP 21295/2000,

in which the counter affidavit filed by the respondent is Ext.P9. Writ petition was finally disposed of by Ext.P10 judgment directing the 2nd respondent to examine the matter. The matter was accordingly re-examined and by Ext.P15, the respondents concluded that the petitioner is liable to make good the loss sustained by the Government. The liability was thereafter quantified by Ext.P16 and it is in this background, this writ petition has been filed.

3. The main contention in this writ petition is that the petitioner has not admitted the breach. It is contended that since breach is not admitted, Government being one of the parties to the contract cannot sit in judgment over the disputed question of breach. This contention is raised placing reliance on the judgments of this court reported in **Abdul Rahiman v. D.F. Officer (1988(2) KLT 290), Kunhammed v. State of Kerala (1999(3) KLT S.N.49)** and **Paily v. State of Kerala (2000(3) KLT 343)**.

4. Petitioner disputes the breach mainly relying on Ext.P1 and contending that in the absence of serving selection notice, there was no obligation on his part to execute the agreement. Ext.P1 provides that the petitioner will execute the necessary

agreement towards execution of the work within the prescribed time on receipt of the selection notice. It is stated that in accordance with Ext.P2, issuance of selection notice has to be by registered post with acknowledgment due. Petitioner makes reference to Ext.P9, the Despatch cum Stamp Account Register maintained in the office of the respondents and argues for the position that the respondents are contending that the selection notice has been delivered to the petitioner by hand delivery on 12/8/99. According to him, it was not the selection notice which was served on him, but some other communication although he is not explaining what the communication was. It is stated that since the rules require that the selection notice should be served by registered post acknowledgment due and that being the manner of service which is recognised by law, any other mode of service is no service in the eye of law. Logically the argument is that selection notice even if served otherwise than by registered post, the petitioner did not have the obligation to execute the agreement or the work.

5. This contention of the petitioner is answered by the respondents in the statement filed as directed by this Court. It is stated that selection notice for the work was issued to the

petitioner and he had received the same on 12/8/99. It is stated that as per the rules, a Contractor has to execute the agreement for the work within twenty days of receipt of selection notice. It is stated that since he did not respond to the selection notice, notice was issued to the petitioner as on 9/9/99 and that on 20/9/99 petitioner replied that he is under medical treatment and doctors advised him to take rest for thirty days and also requested for exonerating him from the work. It is stated that even thereafter, petitioner did not report in the office of the respondents and therefore action was taken to rearrange the work at the risk and cost of the petitioner. Again a letter was issued to the petitioner on 30/9/1999, which also was not responded and therefore the work was awarded to the second lowest tenderer. They also rely on the preliminary agreement executed on 29/6/1999, which was executed by the petitioner.

6. From this contention of the respondents, it is obvious that according to them selection notice was given and that it was thereafter that the petitioner sought permission of the respondents to relieve him from work. It is true that as contended by the petitioner that there is nothing to indicate that the selection notice was served to the petitioner by registered

post, which appears to be a requirement of the Kerala PWD Manual. However, I am not prepared to accept the contention of the learned counsel for the petitioner that for the only reason that the selection notice was not served by registered post acknowledgment due as contended by him, he should be discharged of the consequences of the default that he has committed thereafter. After all, it is a procedural requirement and the question is whether selection notice has been served or not. Here, in the light of the explanation offered by the respondents in their statement that selection notice has been received by the petitioner on 12/8/99 and the acknowledgment that he has given in Ext.P9 and also taking into account the conduct of the petitioner subsequent thereto, I am inclined to believe the version of the respondents rather than that of the petitioner.

7. If that be so, the argument of the petitioner that there is a dispute on the issue as to whether breach has been committed has no force at all.

8. That apart, admittedly, this is a case where the petitioner has not done any work. Therefore breach cannot be disputed irrespective of whose responsibility it was. If that be so,

the breach thus remaining an admitted fact, I see no justification for the petitioner's contention that the respondents should take recourse of the Civil Court and thereafter only that they can recover the damages sustained.

9. The other contention that is raised by the petitioner is regarding the correctness of the amount that was sought to be recovered. This is one of the consequences of the breach. In this context, the petitioner refers to Ext.P14 and contends that on cancellation of the contract in full or part, respondents can only recover the amount that has to be paid for the remaining portion of the work and that too at the rate accepted by him. A reading of Ext.P14 leads me to think that Ext.P14 is of no assistance to the petitioner. Ext.P14 says that on cancellation of the contract in full or part, the Engineer shall determine and recover from the Contractor the amount indicated therein. It says that in case the work is incomplete, the difference can be recovered only at the agreed rate. However, this is a case where petitioner has not done work at all. Therefore, Ext.P14, which deals with the situation where a work remains incomplete and is re-arranged is inapplicable to the case in hand.

10. That apart, it is also seen from Clause 6 of the

preliminary agreement executed by the petitioner with the Department on 29/6/1999 and referred to in the statement filed by the respondents that the said provision takes care of situation like this. It authorised the respondents to rearrange the work and recover the loss that they have sustained. If that be so, petitioner has to be held to be governed by the terms of the preliminary agreement that he had executed with the respondents on 29/6/99. Even otherwise, going by the normal standards, the petitioner's contention cannot be accepted. Though he had agreed to do the work at the 1996 schedule of rates, by the time the work was rearranged and got done, the 1999 schedule had come into force. Unless otherwise provided for in the contract between the parties, the loss has to be quantified at the 1999 schedule of rates, which the Government had to pay on account of the default committed by the contractor. Therefore, on both grounds, I do not agree with the submissions made by the petitioner.

Writ petition fails and is dismissed.

ANTONY DOMINIC, JUDGE.

Rp